



**THE ATTORNEY GENERAL
OF TEXAS**

AUSTIN 11, TEXAS

PRICE DANIEL
ATTORNEY GENERAL

March 6, 1947

Hon. W. R. Cousins, Jr.
Chairman, Privileges and
Elections Committee
State Senate
Austin, Texas

Opinion No. V-78

Re: Constitutionality of S. B.
No. 67, 50th Leg., amend-
ing the election laws.

Dear Sir:

You request an opinion from this department on the above-titled subject matter, your letter being as follows:

"I have been directed by the Committee on Privileges and Elections to submit Senate Bill No. 67 to you for an opinion on its constitutionality. We are particularly interested in this bill as to the directions contained in the Constitution, Article 6, Section 4, which requires the legislators to provide for the numbering of ballots to detect and prevent fraud. We further would like to know whether in your opinion under the Constitutional Mandate it is necessary that a ballot be identifiable if illegally cast, in the event of a contest of the election or upon proof of an irregularity in connection therewith."

Senate Bill No. 67 accompanies your request. We have carefully studied the bill, including, of course, the title, and we find no constitutional vice therein. We shall discuss, however, the particular features mentioned in your letter.

According to the title and the emergency clause, the purpose of the bill is to provide "a more secret ballot in all elections in Texas". The principal change contemplated by this bill is the provision for the numbering of ballots on a perforated coupon which shall be torn or detached from the remainder of the ballot and placed in a box separate from the box in which the remainder of the ballot is deposited.

The bill retains the provision for the election judge to sign his name on the back of the ballot and to place the number on the detachable slip by the name of the voter on the voting list at the time that the ballot is delivered to the voter. It further provides that the election officials shall compare the number on the detachable slip with the number on the voting list at the time the ballot is returned by the voter and in his presence to be certain that it is the same ballot which was delivered to the voter. Then, under the provisions of this bill the detachable slip is to be torn off and deposited in a separate box and the remainder of the ballot deposited in a box prepared for the marked portions of all ballots cast at the elections. Thus, after depositing the separate portions of the ballots in the separate boxes it will be impossible thereafter to identify the individual ballot of any individual voter either in an election contest or otherwise.

Obviously, the purpose of the bill is to make it impossible for anyone to determine by lawful or unlawful means how an elector voted. Your question is whether such a plan meets the requirements of Section 4, Article VI of the Constitution of Texas which requires the numbering of tickets and reads as follows:

"In all elections by the people the vote shall be by ballot and the Legislature shall provide for the numbering of tickets and make such other regulations as may be necessary to detect and punish fraud and preserve the purity of the ballot box, and the Legislature may provide by law for the registration of all voters in all cities containing a population of 10,000 inhabitants or more."

We are compelled to answer your question in accordance with the interpretations of the above constitutional provisions made by the Supreme Court of Texas in the case of Wood vs. State of Texas Ex. Rel. Lee, 133 Tex. 110, 126 S. W. (2nd) 4, which answers the identical question as relates to voting machines. The question in that case was whether voting machines, which do not use a written ballot or ticket, and which render it impossible to later identify the vote of an individual in an election contest or otherwise, meet the constitutional requirements quoted above. In answer to the question, the Supreme Court said:

"The second requirement of this constitutional provision is that the tickets shall be numbered. The word 'shall' is used in this requirement, just as it is used in the first one above discussed. In both instances, we think the term is mandatory, and not merely permissive. It will be noted that the word 'ticket' is used. It is provided that the tickets shall be numbered. Of course, the word 'ticket,' as here used, means the same as the word 'ballot.' The ballot must be numbered. If we understand this record, the election officers kept a poll list which showed the name and number of each voter. When the voter registered his vote on the machine, it (the machine) recorded the number of the ballot. To our minds, this meets the requirement of the Constitution. As we understand this machine, it is not possible from the record made by it to determine, in an election contest, how each voter voted. Be that as it may, the Constitution contains no such requirement. The Constitution simply requires that the ticket shall be numbered. The machine does that.

"The third provision of the above-mentioned constitutional amendment is that the Legislature shall make such other regulations as may be necessary to detect and punish fraud, and preserve the purity of the ballot. This constitutional provision is addressed to the sound discretion of the Legislature. It is not for the courts to attempt to direct what laws the Legislature shall enact to comply with it. * * *

"As we understand this record, the voting machines used in this election recorded the total number of votes for each candidate for Mayor, but did not make a record showing which candidate each voter voted for. It is therefore evident that the testimony in this regard must come from some other source. We think that one of the ways to ascertain how a voter voted, where a machine like this has been used, is to put such voter on the witness stand, and ask him the question. He can answer disclosing how he voted, if he so chooses. That is a matter the voter himself can control. On the other hand, the Constitution guarantees each voter a secret ballot;

consequently he can decline to reveal how he voted, if he so chooses. * * * "

It is evident that the perforated ballots provided in Senate Bill 67 come a lot nearer following the constitutional provision for numbered tickets than do voting machines. In the case of the perforated ballots, the tickets are actually numbered and the number of each ticket is placed opposite the voter's name on the voting list at the time of delivery and the numbers are compared when the ballot is returned and before the perforated slip is detached. In view of the Supreme Court's opinion on voting machines, there can be no question but that the numbering of these perforated ballots will meet the constitutional requirements.

It is within the sound discretion of the Texas Legislature to weigh the constitutional requirement for a secret ballot as against the constitutional requirement for numbering and such other regulations as may be necessary to detect and punish fraud and preserve the purity of the ballot, and thereby decide upon regulations and procedures that will accomplish as nearly as possible both of these important purposes. In no event does the Constitution require that a voter's ballot be identifiable in an election contest. In fact, the weight of authority outside of Texas is to the effect that provisions for numbering of ballots to correspond to the number of the voters on the poll list so as to be identifiable later is "regarded as infringing the constitutional guaranty of secrecy of the ballot". (29 Corpus Juris Secundum, # 171, p. 246). In Texas, the contrary rule -- that such system does not infringe upon the constitutional guaranty of secrecy -- has been followed. (Johnson vs. Clark, 25 F. Supp. 285)

In view of the above decisions, it is within the power of the Texas Legislature to determine the relative merits of the above mentioned voting procedures and if it decides to adopt the system provided in Senate Bill 67, the Legislature will violate no constitutional provision of this State.

SUMMARY

Senate Bill 67 of the 50th Legislature, Regular Session, providing numbered perforated ballots to be used in elections so that a voter's

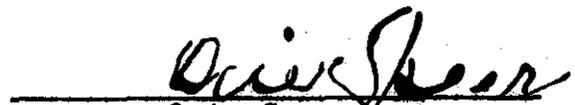
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ballot cannot be identified after its deposit in the election boxes, does not violate Section 4 of Article VI of the Constitution of Texas, in view of the interpretation of that section heretofore made by the Supreme Court of Texas in Wood v. State of Texas Ex Rel. Lee, 133 Tex. 110, 126 S. W. (2nd) 4.

Yours very truly,



Price Daniel
Attorney General of Texas



Ocie Speer
Assistant Attorney General